STATE OF MICHIGAN

COURT OF APPEALS

PAULA CARTWRIGHT,

Plaintiff-Appellant,

v

RITE AID OF MICHIGAN, INC.,

Defendant-Appellee.

UNPUBLISHED
March 15, 2007

No. 272691
Roscommon Circuit Court
LC No. 05-725652-NO

Before: Servitto, P.J., and Talbot and Schuette, JJ.

Talbot, J. (*concurring in part and dissenting in part).*

Although I concur that the trial court erred in granting summary disposition on the basis of the open and obvious doctrine in this premises liability case, I would affirm the grant of summary disposition based on defendant's lack of notice of the alleged defect.

It is routinely acknowledged that a possessor of land is not an absolute insurer of the safety of an invitee. *Anderson v Weigand,* 223 Mich App 549, 554; 567 NW2d 452 (1997). An invitor owes an invitee a duty to inspect their premises and make necessary repairs or warn of discovered hazards. *James v Alberts,* 464 Mich 12, 19-20; 626 NW2d 158 (2001). The liability of an invitor must arise through active negligence, through an omission or unreasonable act, or through a condition of which the invitor knew or a condition that was of such character or duration that the invitor should have known it existed. *Clark v Kmart Corp,* 465 Mich 416, 419; 634 NW2d 347 (2001). Specifically, the determination of whether an invitor owes a duty to an invitee turns upon whether the invitor had actual or constructive notice of the hazardous condition. *Id.* This notice element is blatantly lacking from plaintiff's complaint.

Plaintiff acknowledged that when she approached the curb area to step down, that the concrete appeared solid and no defect was visible. According to plaintiff, it was only when she stepped on the area that the concrete crumbled and she fell. Because no evidence existed that defendant or its employees either caused the hazard or had actual knowledge of it, plaintiff was required to prove that defendant should have known about the condition. *Clark, supra* at 420. Notice may be inferred from evidence that the hazard existed for a sufficient duration that a prudent invitor would have discovered the condition. *Id.* at 419 (citation omitted). However, when no evidence is presented to prove the condition had existed for a sufficient time period, summary disposition in favor of the invitor is appropriate. *Whitmore v Sears, Roebuck & Co,* 89 Mich App 3, 8; 279 NW2d 318 (1979). In this instance, plaintiff's testimony demonstrates that

defendant was not on notice of the condition, as it did not exist until plaintiff stepped on the area of the curb.

Plaintiff implies that other areas of the curb showed wear and tear from cars in the parking lot. However, plaintiff acknowledges that these do not comprise the area of her fall. The mere existence of other defects in the curb area is insufficient to establish that defendant should be charged with knowledge of the alleged defective condition of the section of the curb that caused plaintiff's fall. Constructive notice of a hazardous condition can be supported by reasonable inferences drawn from the evidence, but such inferences must amount to more than mere speculation or conjecture. *Whitmore, supra* at 9. Defendant's manager indicated that she inspected the parking lot area daily and plaintiff admitted that the area of the curb where she fell appeared to be intact and solid. This Court should not reverse a circuit court's order "when the right result was reached for the wrong reason." *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). As such, I would affirm the grant of summary disposition on the basis of defendant's lack of notice of the alleged defective condition.

/s/ Michael J. Talbot